

# State of Colorado



**Bill Owens**  
*Governor*

**John Zakhem**  
*Board Chair*

**Kristin F. Rozansky**  
*Board Director*

**State Personnel Board**  
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## Meeting Minutes September 19, 2006

The State Personnel Board met in public session on Tuesday, September 19, 2006, at the Colorado State Personnel Board, 633 17th Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604.

The meeting was called to order at approximately 9:16 a.m. Board Members Rich Djokic and John Zakhem were present in person. Board Members Diedra Garcia and Donald J. Mares were present via teleconferencing.

Kristin F. Rozansky, Board Director; Assistant Attorney General Pam Sanchez, Board Counsel; and Jane Sprague, General Professional III, were also present in person.

### **I. REQUESTS FOR RESIDENCY WAIVERS**

#### **A. September 1, 2006 Report on Residency Waivers**

Director Rozansky reported that there was a residency waiver request from the Department of Public Safety, Colorado State Patrol, for the Intern position, which she granted. After receiving questions from Mr. Zakhem on the request, the Director offered to bring the request to the Board at its October meeting. In addition, the residency waiver request from the Department of Human Services for the Nursing Home Administrator position for Fitzsimons Nursing Home is pending. The Director requested supplemental information regarding the request, and last week, the agency provided additional information mid-week.

### **II. PENDING MATTERS**

There were no pending matters before the Board this month.

### **III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES ON APPEAL TO THE STATE PERSONNEL BOARD**

There were no Initial Decisions or other Final Orders of the Administrative Law Judges on appeal to the Board this month.

#### **IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES TO GRANT OR DENY PETITIONS FOR HEARING**

- A. Darlena J. Clements v. Department of Regulatory Agencies, Division of Insurance, State Personnel Board case number 2007G001.

Prior to consideration of this matter, Board Counsel Sanchez disclosed that although the agency (DORA) is one of her clients, she perceived no conflict of interest in advising the Board regarding this matter. Mr. Djokic moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Djokic, Ms. Garcia, Mr. Mares, and Mr. Zakhem.

- B. Robert W. Murray v. Department of Corrections, State Personnel Board case number 2006G073.

Mr. Zakhem moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Djokic seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Djokic, Ms. Garcia, Mr. Mares, and Mr. Zakhem.

- C. Jeff Hotchkiss v. Department of Corrections, State Personnel Board case number 2007G003.

Mr. Mares moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Djokic seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Djokic, Ms. Garcia, Mr. Mares, and Mr. Zakhem.

#### **V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES**

- A. Robert Jayme v. Department of Human Services, Division of Youth Corrections, Lookout Mountain Youth Facility, State Personnel Board case number 2005B131 (August 14, 2006).

#### **VI. REVIEW OF THE MINUTES FROM THE AUGUST 15, 2006 PUBLIC MEETING OF THE STATE PERSONNEL BOARD**

Mr. Mares moved to approve the minutes of the August 15, 2006 meeting as submitted. Mr. Djokic seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Djokic, Ms. Garcia, Mr. Mares, and Mr. Zakhem.

## **VII. ACKNOWLEDGMENTS**

### **DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS AUGUST 15, 2006 PUBLIC MEETING:**

- A. William Thomas Little v. Department of Corrections, State Personnel Board case number 2006B013.

The Board voted to grant Complainant's Motion to Dismiss or Strike Respondent's Notice of Appeal of the Decision of the Administrative Law Judge; to remand the matter to the Administrative Law Judge for an evidentiary hearing on the merits; to place a limitation on discovery (i.e., if full discovery on all issues has been conducted, then the hearing shall occur in 30 days; if more discovery is allowed to be conducted, then the hearing shall occur in 60 days); and based on the Board's findings, to deem that the May 25, 2006, Initial Decision of the Administrative Law Judge does not and can not constitute a final agency action or initial decision with a right of appeal as it does not render a final resolution of the matter upon which the Board could issue a Final Agency Order.

- B. John K. Williams v. Regents of the University of Colorado, University of Colorado System Office, Procurement Service Center, State Personnel Board case number 2005B081.

The Board voted to adopt the findings of fact and conclusion of law in the Initial Decision of the Administrative Law Judge and to adopt the Initial Decision.

- C. David Teigen v. Department of Corrections, Colorado Territorial Correctional Facility, State Personnel Board case number 2003B127.

The Board voted to adopt the findings of fact in the Order Awarding Attorney Fees and Costs and to adopt the Order Awarding Attorney Fees and Costs.

- D. Matthew P. Valdez v. Department of Human Services, Division of Youth Corrections, Platte Valley Youth Service Center, State Personnel Board case number 2005B69.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

- E. Carol Denogean v. Department of Human Services, Pueblo Regional Center, Community Living For Developmentally Disabled, State Personnel Board case number 2006G063.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

## **VIII. REPORT OF THE STATE PERSONNEL DIRECTOR**

David Kaye, Acting Director, Department of Personnel and Administration (DPA), Division of Human Resources (DHR), reported to the Board, introducing himself and Karen Schaefer from Workforce Planning & Development. (Jeff Schutt, former Director of DHR/DPA, retired from state employment on August 26, 2006.)

Mr. Kaye reported that DHR is "doing a full court press" to get pay for performance fully funded by the legislature. There is a new model being developed for performance pay to be presented to Personnel Director Jeff Wells, and input is being elicited from focus groups, industry experts, HR directors, employee organizations, and legislators. The model will handle all previous objections to pay for performance. Finally, a Legislative Audit Committee (LAC) bill is promoting a single salary appropriation, which combines occupational adjustments and performance pay into one source of money, which will provide meaningful raises, even for those receiving Level 2 ratings in performance evaluations (the new evaluation system will have three levels total for evaluation). Finally, DHR is hoping to provide a program to legislators, "Total Comp 101," in an effort to educate them on various compensation issues.

With regard to pandemic flu planning, Mr. Kaye reported that two groups were working on this program statewide: the IACC, an interagency group, including the Health Department and others, and state HR Directors. A draft set of recommendations is being prepared with the goal of the state having sufficient flexibility, in the event of a pandemic flu outbreak, to get the state's work done, even with potentially 40% of the workforce being out due to illness from the flu or caring for family members with the flu. When the Board raised the question of the necessity of statutory changes in order to toll time frames on appeals, for example, Mr. Kaye said that statutory changes may not be necessary, as the Governor may, in the event of an emergency, suspend or toll certain deadlines, an action which would take place pursuant to statute, by executive order and which would be effective for a 30-day period.

## **IX. ADMINISTRATIVE MATTERS & COMMENTS**

### **A. ADMINISTRATIVE MATTERS**

- Cases on Appeal to the Board and to Appellate Courts
- FY2005-2006 Whistleblower Report to the Governor

- Mandate/Order Affirmed in Masse v. Department of Corrections, State Personnel Board case No. 2003B077, Court of Appeals No. 04CA2506

## B. OTHER BOARD BUSINESS

- Staff Activities

In addition to the above, Director Rozansky reported that construction on ALJ DeForest's office was in the process of being finalized. She announced that the Board may travel to Golden to the Colorado Department of Public Safety, Colorado State Patrol, for its November 21, 2006 meeting. The Director stated that the Business Plan was being discussed with staff, and that DPA has submitted a transition plan to the Governor in anticipation of a new gubernatorial administration. Finally, Director Rozansky stated that Board Counsel Sanchez recently celebrated her birthday, and Board members congratulated Ms. Sanchez.

## C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

## X. PROPOSED LEGISLATION AND/OR RULEMAKING

## XI. EXECUTIVE SESSION

- A. Case Status Report
- B. Minutes of the August 15, 2006 Executive Session
- C. Other Business

## XII. BUSINESS PLAN

Mr. Zakhem lead the discussion of the Business Plan, beginning on page 4, "State Personnel Board Customers and/or Stakeholders." Mr. Mares suggested that legislators be included as stakeholders, and Ms. Garcia stated that the Board members have an obligation to the Governor, as well. Board Counsel Sanchez clarified that Board members, both appointed and elected, have an obligation to follow laws, rules, and statutes and are otherwise independent and have no other obligations regardless of source of appointment. Board Counsel further stated that the combination of appointed and elected members provides a balance for representation of ideas. The Board members agreed that "State departments," under "Customer," be expanded to include executive agencies.

Under External Objectives, Mr. Zakhem stated that he had no issues with (1) annual reports and (2) outreach, suggesting that the Board contact the new governor, set up a meeting to cover important aspects of the personnel system, and solicit recommendations for the Board's objectives.

Under (3) interaction between Board members and stakeholders, Mr. Zakhem stated that the Board members must be dedicated to implementing the Business Plan by fulfilling obligations, in addition to attending meetings, in order to dissipate the "ivory tower perception," including meeting with managers and HR folks and relying on them to give the Board a sense of pulse. He added that he likes to ascertain credibility by looking directly into one's eyes, to see what motive lies behind comments on Board rules, and to gain insight in order to do his job better in his role as an adjudicator. In addition, he would like to see each Board member assigned to several agencies, and perhaps a labor association, to talk to members, give presentations at those agencies and associations, and improve the perception of the Board.

Ms. Sanchez noted that there is a distinction between Board members meeting one-on-one with directors and Board members doing presentations. She reiterated, from the August meeting, that any meeting of Board members should be done in a public setting, as she has a concern about the appearance of impropriety and bias. It also could open the door, intentionally or unintentionally, to *ex parte* information. For example, as Mr. Zakhem stated with respect to evaluating someone's credibility during these meetings, relying or even considering such information when evaluating a case that has been adjudicated and is appealed to the Board would be improper. Having discussed this topic with Diana Black, Deputy for the Business and Licensing Section, she stated that no other boards meet with their "stakeholders" outside of their public meetings and that her Deputy shared her concerns and joined in her recommendation to the Board to refrain from engaging in such one-to-one meetings. The only exception to this would be if the Board member were engaged in fact-finding relative to a proposed rule. In the case of rules, Board members have a duty to educate themselves as much as possible in order to render an informed vote. Board Counsel further stated that in keeping with the intent and spirit of the Sunshine Laws, Board meetings must be open to the public to avoid conflict of interest or the appearance of impropriety. Director Rozansky stated that she would like to be included in any meetings with agency directors. Ms. Sanchez stated that the proposed one-to-one meetings were also problematic in that not all stakeholders may have the opportunity to attend such meetings. Board Counsel further stated that such private meetings could then open to all the Board members to discovery and disqualification of Board members from cases where this has occurred. Moreover, the actions of the Board could be nullified, and there is substantial exposure for both the individual and the Board. Ms. Rozansky stated that in the past, an invitation has been made to agency directors to come to speak to the Board; Ms. Sanchez suggested that such an invitation should be put on the Agenda and a record made in the Minutes.

Mr. Zakhem stated that in his vision of communication between the Board members and stakeholders, he does not intend to create a mechanism for bias against

employees, as agencies are viewed as defendants. Ms. Sanchez remarked that complainants or employees have no access to Board members. Mr. Zakhem responded that, for example, Mr. Mares could be assigned to meet with each division of DORA over the next year, including employees. Ms. Sanchez stated that Board members should limit topics to rules if they intended to go forward as individual meetings with directors are problematic. Mr. Djokic opined that Board members could present policy and solicit issues or questions in an open meeting, such as a Continuing Legal Education (CLE) session. Ms. Rozansky suggested that in addition to training managers, those employees who aspire to be managers could also be invited to attend. Ms. Sanchez stated that such a presentation should be done publicly, be announced on the website, and be broad, generic, and open to the public. Mr. Zakhem stated that none of the directors in his meetings has ever mentioned ongoing litigation with him; however, Ms. Sanchez repeated that it just doesn't look right and that directors should come to the public meetings and speak with Board members in open session, perhaps as a round table placed after Executive Session on the agenda so that those not interested would not be forced to attend.

Mr. Djokic stated that Director Rozansky is the point person for contacts with agencies, and that Board members themselves meeting with one stakeholder to the detriment of another is not a good idea. Ms. Sanchez stated that the Board members could meet with a whole division of managers or employees under equal access principles. Mr. Zakhem said that the Sunshine Law does not apply to one Board member meeting with one agency and that all those perceived to be stakeholders should be contacted by individual Board members. Board Counsel agreed, but reiterated that the spirit of the Sunshine Laws would be considered by any reviewing court and, as such, any meetings should be held in keeping with those laws. Mr. Mares stated that the process would become more bureaucratic and time-consuming at the expense of customer service and asked if the Board members were talking about rules in general, must it be in a public place? Ms. Sanchez repeated that there is no problem with discussions about proposed rules. Ms. Sanchez further replied that the standard advice from her office for most boards is that the board members are told not to discuss any board business outside of the board meetings. This is based on concerns about the appearance of impropriety. This is especially true with a board such as the State Personnel Board where a large portion of their duties is quasi-judicial; thus, maintaining the integrity and credibility of the Board is very important because board members are arbiters and the way the Board members meet with the stakeholders should protect the credibility of the members and demonstrate that they are objective and not biased.

Mr. Zakhem asked Board Counsel Sanchez for an expansive view of this topic and to prepare a memorandum with parameters with which Board members can navigate, so that desirable outreach does not flounder. Ms. Garcia stated that Board members could be assigned to agencies and employees could also attend working sessions.

Moving on to External Objective (4), free training, Mr. Zakhem stated that this has worked really well in the past and that the December 2005 CLE was outstanding.

Ms. Rozansky added that she and the ALJs did Risk Management training at the behest of Cristina Valencia, DHR/DPA, and that the universities were also being contacted for training. Mr. Zakhem further suggested that Board members continue to do programs, such as the CLE, presenting Board processes and programs; apply to the Colorado Supreme Court as a CLE provider; and partner with local law firms to share resources.

With regard to (5) revise Chapter 7, Ms. Rozansky stated that she and Ms. Sanchez are putting together a proposal, will solicit comments from stakeholders, and bring it to the Board for consideration.

As to (6) update and streamline the Board's website, Ms. Rozansky stated that she had received suggestions on making the website more user-friendly. Mr. Djokic suggested that the perhaps Board meetings could be broadcast over the web audio, like legislative hearings, for the public to hear. Mr. Zakhem said that since the Capitol was already hooked up for audio, the Board could go there to do its meetings. Ms. Sanchez said that, in addition to the Board's e-mail address on the website, there could be a message that persons listening to the Board hearing could provide feedback by a certain time on the date of the Board meetings for a response by Board members.

Regarding (7) the Board's oversight role, Mr. Zakhem stated that he has heard comments that the Board is perceived as not being independent, due to its close proximity to DPA. He thinks this is a problem for the Board and would like to see budgetary independence and locational independence. Ms. Rozansky remarked that Board staff has been making various changes to insure a perception of independence, to the extent possible. For instance, the Board rules and forms are now located on the Board's website, whereas they had formerly been accessed through DPA/DHR. Mr. Djokic suggested that the Board pursue other office space in order to achieve the goal of budgetary and locational independence. Mr. Mares offered to assist in that endeavor, and Mr. Zakhem added that members of the legislature are very amenable to this idea.

Aside from this discussion, Ms. Garcia asked Board Counsel Sanchez if Board members should lobby and influence legislation. Ms. Sanchez stated that Board members can lobby as individuals, unless the Board takes a position on some legislation and that there is a constitutional provision on how the Board uses its resources. Mr. Mares stated that Board members do not take an oath as to fiduciary duties; Mr. Zakhem stated that administrative law judges should be sworn in by a qualified officer, an employment policy that need not be a Board rule.

Regarding (8) e-filing, Mr. Zakhem suggested that Board members meet with the court filing administrator to see how it works. He also expressed awareness that the Lexis-Nexis contract was up for renewal, access for indigent clients to e-filing is a concern because filing fees are a disincentive for pro bono work, and paperless filing would save the Board money.

The meeting adjourned by consensus.



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**APPROVED THIS 17th DAY OF OCTOBER, 2006.**

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John Zakhem, Chair

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Rich Djokic, Member

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Diedra Garcia, Member

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Donald J. Mares, Member